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IN THE

Supreme Court of the United States

ALABAMA POWER COMPANY,
Petitioner,

v.

FEDERAL COMMUNICATIONS COMMISSION and
THE UNITED STATES OF AMERICA,
Respondents.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

In 1996, Congress granted cable and telecommunications companies a mandatory right of access to a utility's privately owned poles, ducts, conduits and rights-of-way for installation of wires, cables and associated equipment. This statutorily authorized taking entitles a utility to just compensation. Thus, the first question presented for review is:

1. Whether the court of appeals' holdings that:

   a. tangible private property can be categorized as "nonrivalrous" and thus deemed to have zero value; and

   b. mere reimbursement of the cost of preparing private property to be taken ("marginal costs") is sufficient compensation;

violate the Just Compensation Clause of the Fifth Amendment to the United States Constitution.

It is an ancient rule of this Court that Congress cannot both decide what private property is to be taken for public use and also set the rule of compensation. *Monongahela Navigation Co. v. United States*, 148 U.S. 312, 327 (1893). Instead, the determination of just compensation is a judicial inquiry. *Id.* Thus, the second question presented for review is:

2. Whether the court of appeals' ruling comports with this Court's ancient rule where:

   a. Congress not only authorized the taking but also capped the amount of compensation due below market value (or any judicially recognized proxy); and

   b. The court of appeals deferred to an agency determination of just compensation based on the statutory cap and rejected as "irrelevant" a private property owner's evidence of market value.

PARTIES TO THE PROCEEDING

In addition to the parties named in the caption, the parties to the proceeding before the United States Court of Appeals for the Eleventh Circuit were as follows: Alabama Cable Telecommunications Association, American Electric Power Service Corporation, Comcast Cablevision of Dothan, Inc., Commonwealth Edison Company, Cox Communications Gulf Coast, L.L.C., Duke Energy Corporation, Florida Cable Telecommunications Association, Inc., Gulf Power Company, and PECO Energy Company.

Alabama Power Company is a wholly-owned subsidiary of The Southern Company.

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Petition for a Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

PETITION FOR A WRIT OF CERTIORARI

Petitioner Alabama Power Company ("APCo") respectfully requests that this Court grant its petition for a writ of certiorari to review the decision of the United States Court of Appeals for the Eleventh Circuit.

OPINIONS BELOW

The decision of the United States Court of Appeals for the Eleventh Circuit is reported at 311 F.3d 1357 (11th Cir. 2002) and is reproduced in the Appendix to this Petition ("Pet. App.") at 1a-24a. The court of appeals' orders denying the petitions for rehearing and rehearing en banc are unpublished, but are reproduced at Pet. App. 97a-99a. The principal orders of the Federal Communications Commission ("FCC") are *In*

the Matter of Alabama Cable Telecommunications Association v. Alabama Power Company, reported at 15 FCC Rcd. 17,346 (2000) (Pet. App. 87a-96a) and *In the Matter of Alabama Cable Telecommunications Association v. Alabama Power Company*, reported at 16 FCC Rcd. 12,209 (2001) (Pet. App. 25a-86a).

JURISDICTION

The United States Court of Appeals for the Eleventh Circuit entered judgment in this action on November 14, 2002. The court of appeals denied timely filed petitions for rehearing and rehearing en banc on January 8, 2003. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254(1) (1993 & Supp. 2002).

STATUTE AND CONSTITUTIONAL PROVISION INVOLVED

The Pole Attachment Act, 47 U.S.C. § 224 (1994 & Supp. IV 1998), is set forth at Pet. App. 100a-105a.

The Fifth Amendment to the United States Constitution provides in pertinent part: "[N]or shall private property be taken for public use, without just compensation."

STATEMENT OF THE CASE

In *FCC v. Florida Power Corp.*, 480 U.S. 245, 251 n.6 (1987) ("*Florida Power*"), this Court reserved for review the constitutional issues embedded in the Pole Attachment Act in the event that "the FCC in a future case required utilities, over objection, to enter into, renew, or refrain from terminating pole attachment agreements" with cable companies. (internal citation omitted). The Telecommunications Act of 1996 created the precise scenario reserved for review in *Florida Power* by providing mandatory access to a utility's pole space. *See* Pet. App. 100a-105a. This Just Compensation

Clause case squarely raises the central issues reserved by the Court in *Florida Power*.

Additionally, this petition focuses on the court of appeals' departure from this Court's black-letter rule of law that fair market value is the appropriate standard of compensation in a *per se* takings case-a constitutional issue which very recently divided this Court in *Brown v. Legal Foundation of Washington*, No. 01-1325, 2003 WL 1523550 (Mar. 26, 2003) (5-4 opinion) ("*Brown*").

In this case, the court of appeals held that APCo's utility pole space is essentially valueless. The court of appeals created a new category of tangible private property that it labeled "nonrivalrous" (*i.e.*, not subject to competitive uses), and found that the taking of "nonrivalrous" property requires no compensation (just or otherwise) for the actual property taken. Instead, the court sanctioned a rule that requires cable companies to merely reimburse a utility for the costs associated with preparing its property to be taken.

1. The 1978 Act.

In 1978, the cable industry was successful in lobbying Congress to enact the Pole Attachment Act (47 U.S.C. § 224) ("Act"). The Act authorized the FCC to regulate rates charged on voluntary pole attachment leases. The rate structure fell within the narrow range of: (1) a minimum of the additional costs incurred by the utility in providing pole attachments (*i.e.*, marginal costs) and (2) a maximum of an allocable share of each pole. Pet. App. 102a-103a (§ 224(d)) (the "Cable Rate"). The Cable Rate requires cable companies to pay only for the costs of making the pole ready for the attachment and for a small allocation of the costs of the usable portion of the pole (where attachments can be placed). The Act does not require cable companies to pay a direct allocation of the costs of the unusable space on a pole. Unusable space constitutes the vast majority of the pole, including

the portion of the pole extending from the attachments to the ground and the portion sunk underground, both of which serve the sole purpose of supporting all of the elevated attachments and providing the necessary vertical clearances.

Congress noted that the statutory methodology provided cable companies with "a more favorable rate for attachments than other telecommunications service providers." H.R. Rep. No. 104-204, 104th Congress, 2d Sess., at 92 (1995), *reprinted in* 1996 U.S.C.C.A.N. 10, 58; *see* Pub. L. No. 95-234, 47 U.S.C. § 224 (1978). However, Congress intended for the beneficial rate to "spur the growth of the cable industry, which in 1978 was in its infancy." H.R. Rep. No. 104-204, at 91-92, 1996 U.S.C.C.A.N. at 58; *see also* S. Rep. No. 95-580, at 12-14 (1978), *reprinted in* 1978 U.S.C.C.A.N. 109, 120-23. Congress recognized that the cable industry would undergo "changed conditions," and warned that the rate-setting methodology formulated by the FCC would have to be modified to ensure that it accounted for these "changed conditions." S. Rep. No. 95-580, at 21, 1978 U.S.C.C.A.N. at 129. Despite remarkable changes in the cable television industry, the 1978 Cable Rate survives today, unchanged.

2. *Loretto* And *Florida Power*.

In *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419 (1982), this Court considered a New York statute that required property owners to allow cable companies to attach their lines to real property in exchange for payment set by a state commission. The Court held that the cable company's government-authorized attachment of cable lines and equipment to the owner's real property was a "permanent physical occupation of property . . . [a] taking" requiring just compensation. *Id.* at 441.

Five years later, in *Florida Power*, this Court held that the *Loretto* physical taking analysis did not apply to voluntary pole attachment leases under the 1978 Act. Nonetheless, the

Court expressly stated: "We do not decide today what the application of *Loretto* would be if the FCC in a future case required utilities, over objection, to enter into, renew, or refrain from terminating pole attachment agreements." 480 U.S. at 251 n.6 (internal citation omitted).

3. Cable Companies Flourish Under The Subsidized Rate.

Within this climate of cable attachments subsidized by artificially low rates, Congress' vision of "wider development of cable television service to the public" was realized. S. Rep. No. 95-580, at 14, 1978 U.S.C.C.A.N. at 122. America's cable industry is now oft-characterized as an "oligopoly," ultimately controlled by five or six large companies, some of which (*e.g.*, Time Warner and AT&T) dwarf even the nation's largest electric utilities.[1] *See* Whitmore, *Congress, the U.S. Supreme Court and Must-Carry Policy: A Flawed Economic Analysis*, 6 Comm. L. & Pol'y 175, 212 (2001) ("the industry is controlled by the top 100 cable firms, which serve 99.4% of all basic cable subscribers . . . [t]he top 100 cable systems are . . . overwhelmingly controlled by the top six cable companies."); Garon, *Media & Monopoly in the Information Age: Slowing the Convergence at the Marketplace of Ideas*, 17 Cardozo Arts & Ent. L.J. 491, 586-87 (1999) (describing "media industries" as an "oligopoly model" and citing AT&T's purchase of TCI and

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[1] Time Warner and AT&T were both complainants in the FCC proceedings resulting in the orders reviewed by the court of appeals. At the time of the underlying FCC filings, Time Warner was the largest cable operator in the United States. APCo's Answer to Stay, Ex. 6, p. 1. Time Warner's 1999 revenue from its cable operations totaled $6,111,000,000. *Id.* By contrast, APCo's 1999 revenue from all operations was only $3,385,474,000. *See* Form 10-K of Alabama Power Company, at II-58 (Feb. 13, 2002), *available at* http://www.sec.gov/Archives/edgar/data/3153/000009212202000045/Form10k.txt.http://www.sec.gov/Archives/edgar/data (last visited April 1, 2003).

"effort[s] to consolidate cable operations and integrate telephone service into the cable infrastructure"). One cable industry analyst explained that cable companies "have morphed into two-way broadband behemoths . . . with new-found size and scale . . ." APCo's Response to Complaint, ¶ 27, p. 22 (citing *The Cable TV Financial Databook 2000*, Paul Kagan Associates, Inc., at 7).

4. The 1996 Amendments To The Pole Attachment Act.

As part of the Telecommunications Act of 1996, Congress amended the Pole Attachment Act in two ways: (1) to give cable and telecommunications attachers a mandatory right of access to a utility's pole network; and (2) to create a separate rate structure for telecommunications attachers ("Telecom Rate"). Pet. App. 103a-104a (§§ 224(e)-(f)). Unlike the Cable Rate, which Congress did not modify, the Telecom Rate included allocations for both the usable and unusable space on the pole. *Id.* (§ 224(e)). By authorizing the mandatory taking of space on utility poles and directing the FCC to charge two different rates (one still "favorable" to cable companies) for the exact same pole space taken, the 1996 amendments set the stage for utility companies to raise the constitutional questions reserved for review in *Florida Power*.

5. APCo Implements A Just Compensation Price.

A facial challenge to the 1996 amendments resulted in the court of appeals holding that the mandatory access provisions constituted a physical taking under *Loretto*. *See Gulf Power Co. v. United States*, 187 F.3d 1324 (11th Cir. 1999) ("*Gulf Power*"). The court of appeals refused, however, to find the taking unconstitutional on the grounds that the issue of just compensation was unripe. Accordingly, APCo developed a revised pole attachment charge (applicable to all attaching entities) that was consistent with this Court's just compensation jurisprudence. APCo's price for fiscal year 1999

($38.81 per pole, per year) was computed by using current replacement costs (instead of the FCC-imposed historical costs) and allocating costs associated with both the usable and unusable space on the poles (as Congress had done with the Telecom Rate). The FCC's Cable Rate for the same period was $6.30 per pole. Although markedly higher than the historically favorable Cable Rate, APCo's charge was more in line with its unregulated rate charged to, and voluntarily paid by, incumbent telephone companies (which ranged from $25.00-$40.00 in 1999). APCo's Response to Complaint, Ex. A, ¶ 14.

6. APCo's Challenge To The Cable Rate.

On June 23, 2000, the Alabama Cable Telecommunications Association and Comcast Cablevision of Dothan, Inc. (collectively "ACTA") filed a pole attachment complaint with the FCC challenging APCo's revised pole attachment charge. APCo submitted evidence justifying its replacement cost methodology (as a proxy to fair market value), including expert appraisal testimony. On September 8, 2000, the FCC's Cable Bureau (relying principally on regulatory rate-making cases) ruled in favor of ACTA, holding that the statutory rate was constitutionally sufficient and stating that it would not consider a higher charge under any circumstance. Pet. App. 90a-91a, 94a, n.17 (¶¶ 3, 7, n.17).[2] Pursuant to 47 U.S.C. § 402(a) (providing for judicial review of FCC orders), APCo appealed the FCC Cable Bureau's decision to the United States Court of Appeals for the Eleventh Circuit.

In reviewing APCo's challenges to the Cable Rate, the court of appeals agreed that the "FCC inappropriately focused

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[2] *See also Teleport Communications Atlanta, Inc. v. Georgia Power Co.*, 2001 FCC LEXIS 6145, at *7 (Nov. 14, 2001) (rejecting Georgia Power's just compensation evidence as "materials that purport to support an alternative methodology for calculating pole attachment rates, a methodology that has been rejected by the Commission").

on ratemaking cases." Pet. App. 15a-16a. The court of appeals also recognized that, while several proxies may be used to determine market value for purposes of just compensation, "[t]he appropriate alternative, whatever that may be, rarely countenances the use of historical cost, as several Supreme Court cases make clear." Pet. App. 16a.

Nonetheless, the court of appeals jettisoned all previously recognized market value proxies and instead adopted a novel theory: after reimbursement of the marginal costs of making a utility pole ready for the attachment of cable lines, a utility is entitled to no compensation for the pole space actually taken. Pet. App. 16a-18a. The court of appeals explained that a utility would be entitled to seek compensation for the actual pole space taken only if it could show with regard to each pole that: (1) the pole is at full capacity; and (2) either (a) another buyer of the space is waiting in the wings, or (b) the power company is able to put the space to a higher-valued use with its own operations. Pet App. 21a, 24a.

The court of appeals based its conclusion on the premise that APCo's pole space is "nonrivalrous"—a term the court defined as meaning "the use by one entity does not necessarily diminish the use and enjoyment of others." Pet. App. 18a. The court of appeals held that a utility would be entitled to something more than marginal costs only if a pole was crowded with lines because, according to the court, only when a pole is full and another entity wants to attach does "the government taking foreclos[e] an opportunity to sell space to another bidding firm—a missed opportunity that does not exist in the nonrivalrous scenario." Pet. App. 20a.

Although the court of appeals noted that it was charged with reviewing "constitutional challenges to agency orders *de novo*," (Pet. App. 15a), it ignored the record evidence that contradicts its finding that APCo's poles space is a valueless and unlimited resource. The court of appeals went so far as to hold, under inapplicable agency deference principles, that

the FCC was not "obliged to engage in detailed analysis of [APCo's] expert testimony" or APCo's proffered market value proxies. Pet. App. 22a-24a. As such, the court cast APCo's evidence aside as "irrelevant." *Id.*

REASONS FOR GRANTING THE WRIT

Introduction And Summary Of Reasons

This Court should grant this petition for certiorari to settle the specific constitutional questions reserved in *Florida Power.* These are important questions of first impression with national significance. Moreover, this case presents the Court with an opportunity to clarify the constitutional issue that divided this Court in *Brown*, 2003 WL 1523550 (5-4 opinion), *i.e.*, the continued viability of the black-letter rule that fair market value is the measure of compensation in physical takings cases. The continued synonymy of just compensation and fair market value is of national significance to all private property owners.

The court of appeals' decision abandoned this Court's well-settled takings jurisprudence by holding that after reimbursement of marginal costs (*i.e.*, the cost of preparing the property for use by the taker), certain tangible private property has no value. The panel created out of whole cloth a new just compensation analysis for what it called "non-rivalrous property"—a category of property heretofore unknown to takings jurisprudence. The court of appeals, to borrow from Justice Scalia's dissent in *Brown,* created "a novel exception to [this Court's] oft-repeated rule that the just compensation owed to former owners of confiscated property is the fair market value of the property taken." 2003 WL 1523550, at *14 (Scalia, J., dissenting).

This case presents questions of federal statutory and constitutional law that are important to multiple segments of several national industries: cable television, telecommu-

nications and public utilities (electric and other). Millions of dollars and millions of miles of utility pole networks are impacted. The issue arises out of what the court of appeals acknowledged was "monumental" federal legislation (the 1996 Telecommunications Act) that implemented "sweeping changes" in the relationship between the parties at issue in this case. Pet. App. 5a, 7a. This Court already has reviewed the changes made in the 1996 Act twice. *Nat'l Cable & Telecomms. Ass'n v. Gulf Power Co.*, 534 U.S. 327 (2002); *AT&T Corp. v. Iowa Utils. Bd.*, 525 U.S. 366 (1999) ("*Iowa Utilities Board*"). In *Iowa Utilities Board*, this Court expressly noted the Act's importance as "a piece of legislation that profoundly affects a crucial segment of the economy worth tens of millions of dollars." 525 U.S. at 397.

The issues presented have importance beyond the parties to this case. Merely by labeling property as "nonrivalrous," the court of appeals concluded that the government can take private property for public use and, after reimbursement of "marginal costs," pay nothing for it so long as the property was unused, vacant, or situated such that the owner's core use can continue. If allowed to stand, the court of appeals' holding will be applied in other contexts with potentially alarming results for all private property owners. Such a departure from "80 years of [this Court's] precedent" "equat-[ing] just compensation with the fair market value of the property taken" can only lead to "disastrous" results. *Brown*, 2003 WL 1523550, at *14, *15, *19 (Scalia, J., dissenting).

For example, suppose Congress, as part of the Telecommunications Act of 1996, not only granted cable and telecommunications companies a mandatory right of access to utility poles, but also granted them a mandatory right of access to any other private property needed to run their cables. Further, suppose a cable company exercised this mandatory right of access for the purpose of constructing a one-mile underground corridor which passed through a privately owned field. Under the court of appeals' analysis,

that cable company would assert that its underground occupation of the property is "nonrivalrous" because its use of the property does not interfere with the property owner's use and enjoyment of the remainder of his property. Under the court of appeals' analysis, the cable company asserts that it pays nothing for the property after reimbursing the landowner for the marginal costs associated with the taking (such as the costs of digging and burying the cable). This result is absurd. Prior to the court of appeals' ruling, no one, including the cable companies and the federal government, would have questioned that the landowner is entitled to something more than the marginal costs associated with the taking.

In fact, AT&T, one the complainants in the FCC proceedings below, recently settled a series of class action lawsuits brought by private landowners on whose land AT&T had buried fiber optic cables on abandoned railroad rights-of-way. In at least one of these settlements, AT&T paid an average of $45,000 per linear mile for its attachments. *See* Sunderland, *Rights-of-Way Rifts Sidetrack Long Distance Carriers,* Phone+, at ¶ 5 (Sept. 1999), *available at* http://www.phoneplusmag.com/articles/991carri.html (last visited April 1, 2003). If AT&T's access to the subject property had been through congressionally authorized condemnation rather than private negotiation, the resulting compensation should be no different. Under the court of appeals' analysis, however, the result would be alarmingly different.[3]

Finally, the determination of just compensation is a judicial function. *Monongahela Navigation Co. v. United States*, 148 U.S. 312, 327 (1893). Congress is prohibited from

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[3] The federal government is also very familiar with the value of communications rights-of-way. In fact, the court of appeals' ruling conflicts directly with the federal government's own practice of charging "market value" when it leases its own property for fiber optic attachments in government rights-of-way. *See* pp. 20-23 *infra.*

deciding (on a political basis) what property may be taken and, at the same time, setting a binding rule of compensation. The *Monongahela* rule rests upon principles of separation of powers and due process. In this case, APCo was subjected to a congressionally imposed and judicially sanctioned procedural whipsaw that resulted in the court of appeals calling APCo's just compensation evidence "irrelevant" and "hardly warrant[ing] an evidentiary hearing." Pet. App. 24a. Here, Congress' rule has become a binding rule of compensation without any judicial review of the evidence. This Court's ancient principle of law established in *Monongahela* has been ignored.

Once again borrowing the words of Justice Scalia, the court of appeals' ruling that APCo is "not entitled to the market value of [its]confiscated property has no basis in law." *Brown*, 2003 WL 1523550, at *19 (Scalia, J., dissenting). This Petition should be granted.

I. THE COURT OF APPEALS' DECISION DEPARTS FROM THIS COURT'S WELL-DEFINED BODY OF TAKINGS LAW.

In a long line of cases, this Court has defined the term "just compensation" as the "full monetary equivalent of the property taken." *United States v. Reynolds*, 397 U.S. 14, 16 (1970) (citing *Monongahela*, 148 U.S. at 326); *accord United States v. Miller*, 317 U.S. 369, 373 (1943). The full monetary equivalent is generally determined by the "market value" of the property on the date it is appropriated. *Palazzolo v. Rhode Island*, 533 U.S. 606, 625 (2001) ("When a taking has occurred, under accepted condemnation principles the owner's damages will be based upon the property's fair market value."); *see also Kirby Forest Indus. v. United States*, 467 U.S. 1, 10 (1984); *United States v. 564.54 Acres of Land*, 441 U.S. 506, 511 (1979); *Brown*, 2003 WL 1523550, at *17 (Scalia, J., dissenting). This Court has wisely maintained uniformity in just compensation jurisprudence by employing

the familiar hypothetical "willing buyer/willing seller" standard to define "market value." *Kirby Forest*, 467 U.S. at 10; *564.54 Acres of Land,* 441 U.S. at 511; *Miller,* 317 U.S. at 374. Although the market value standard is applied in the vast majority of takings cases, it is not universal. *Miller*, 317 U.S. at 374; *see also Brown*, 2003 WL 1523550, at *15 (Scalia, J., dissenting). For example, where market value is too difficult to determine or where the property rarely is sold in the market, this Court mandates a market value "proxy." *564.54 Acres of Land*, 441 U.S. at 512.

Instead of following this Court's well-defined body of takings law, the court of appeals invented a zero value/ "marginal cost" proxy for market value—a standard that prior thereto had never been recognized in any physical takings case. The court of appeals thus created "a novel exception to [this Court's] oft-repeated rule that the just compensation owed to former owners of confiscated property is the fair market value of the property taken." *Brown*, 2003 WL 1523550, at *14 (Scalia, J., dissenting).

A. The Court Of Appeals Inappropriately Applied Rate Regulation Principles To A Physical Takings Case.

This is a takings case; it is not a rate regulation case. The distinction is significant. *Palazzolo*, 533 U.S. at 628 ("Direct condemnation . . . presents different considerations from cases alleging a taking based on a burdensome regulation."); *Brown*, 2003 WL 1523550, at *10 ("Our jurisprudence involving condemnations and physical takings is as old as the Republic and, for the most part, involves the straightforward application of *per se* rules. Our regulatory takings jurisprudence, in contrast, is of more recent vintage and is characterized by 'essentially ad hoc, factual inquiries.'") (citations omitted). In rate regulation, the rate must simply not be "so 'unjust' as to be confiscatory." *Duquesne Light Co. v. Barasch*, 488 U.S. 299, 307 (1989). In takings cases,

the bar is much higher and uncompromising, *i.e.*, "the full and perfect equivalent in money of the property taken." *Miller*, 317 U.S. at 373; *see also Brown*, 2003 WL 1523550, at *17 (Scalia, J., dissenting). There is a "broad zone of reasonableness" associated with rate regulation. *In re Permian Basin Area Rate Cases*, 390 U.S. 747, 770 (1968); *see also Brown*, 2003 WL 1523440, at *10 ("careful examination and weighing of all relevant circumstances"). There is no such "zone" in just compensation cases, and policy-driven balancing of interests is prohibited. *See, e.g., 564.54 Acres of Land*, 441 U.S. at 512; *Brown*, 2003 WL 1523550, at *10 ("'When the government physically takes possession of an interest in property for some public purpose, it has a categorical duty to compensate the former owner.'") (quoting *United States v. Pewee Coal Co.*, 341 U.S. 114, 115 (1951)). As such, this Court's analysis of the Cable Rate in *Florida Power* (applying regulation standards) no longer applies. The issues reserved by this Court in *Florida Power* must now be addressed under this Court's "straightforward . . . *per se* [takings] rules." *Brown*, 2003 WL 1523550, at *10.

1. *Mere Reimbursement Of Marginal Costs Is Not Just Compensation.*

The court of appeals itself recognized the importance of the above distinction when it criticized the FCC for "inappropriately focus[ing] on ratemaking cases," and then acknowledged, "[w]hen a physical taking is at issue . . . a different analytical hat must be worn." Pet. App. 15a-16a. The court of appeals even noted that "[t]he Supreme Court made this analytical distinction clear in [the *Florida Power* case]." *Id.* Yet, the court of appeals itself failed to change hats and thus committed the very same constitutionally critical error.

The FCC uses historical costs in its application of the statutory Cable Rate. Pet. App. 78a-79a (¶¶ 66-67). Although upheld by this Court under rate regulation principles in *Florida Power*, the historical cost measure is much-

maligned when applied in a takings context. The court of appeals' decision even noted that a just compensation award based upon a "backwards-looking" "historical cost" proxy "is rarely countenance[d] . . . as several Supreme Court cases make clear." Pet. App. 16a-17a (citing *United States v. Commodities Trading Corp.*, 339 U.S. 121, 130 (1950); *United States v. Toronto Hamilton & Buffalo Navigation Co.*, 338 U.S. 396, 403 (1949)). In *Toronto*, the Court called historical (or "original costs") a "false standard of the past." 338 U.S. at 403; *see also Olson v. United States*, 292 U.S. 246, 255 (1934) ("It is the property and not the cost of it that is safeguarded by [the] Constitutio[n].") (quoted in *Brown*, 2003 WL 1523550, at *17 (Scalia, J., dissenting) (alterations in original)). Nonetheless, the court of appeals went beyond even the "false standard of the past" and brought to life a zero value/marginal cost standard.

"Marginal cost" has never been a recognized proxy for market value and cannot be found in any takings decision issued by this Court or any federal court of appeals. The court of appeals cited *Metropolitan Transp. Auth. v. ICC*, 792 F.2d 287 (2d Cir. 1986), for the proposition that marginal costs can, in "some cases," constitute just compensation. APCo has been unable to locate even one such case, much less "cases." Even the *Metropolitan* case - the *only* authority cited by the court of appeals to support its marginal costs approach—is not a takings case; it is a rate regulation case. Thus, after rejecting as "inappropriate" any rate regulation analysis, the court of appeals relied exclusively upon a rate regulation case.

2. *The Court Of Appeals' Holding Creates A Constitutional Non-Sequitur.*

The most glaring example of the court of appeals' own ratemaking analysis is its footnote conclusion that the disparate rates for the taking of identical pole space (*i.e.*, the Cable Rate vs. the Telecom Rate) is "irrelevant" due to

Congress' "legislative discretion." Pet. App. 22a, 21a, n.23. Legislative discretion cannot trump the protections afforded by the Fifth Amendment. *Gulf Power*, 187 F.3d at 1331 ("However laudatory its motive, Congress' power to regulate utilities does not extend to taking without just compensation the right of a utility to exclude unwanted occupiers of its property."). Although the Telecom Rate is not an issue in this proceeding, the existence of a higher rate for attachments virtually identical to cable attachments—occupying an identical amount of space—is constitutionally significant. At a minimum, the disparity between the two rates demonstrates: (1) the existence of more complete compensation to pole owners; (2) the irreconcilable incongruity between principles of rate regulation and constitutional standards of just compensation; and (3) immediate, identifiable and rivalrous "lost opportunity."

Under the record evidence in this case, if a cable company takes one foot of APCo's pole space, the Cable Rate limits APCo's recovery to $6.30. Pet. App. 90a-91a (¶ 3). If a telecommunications company takes that same one foot of pole space, the telecommunications company would pay the significantly higher Telecom Rate. *Id.* The only difference is that the Cable Rate's so-called "allocation" does not include a fair share of the unusable space supporting the elevated portion of the pole on which cables can be attached. The Telecom Rate, however, incorporates an "equal apportionment" of unusable space. Pet. App. 103a (§ 224(e)(2)). APCo's undisputed evidence was that there is absolutely no difference between the nature of the attachments and their respective impacts on APCo (cost or otherwise). APCo's Response to Complaint, Ex. A, ¶ 6. The only distinction between the two attachments is the entity taking the property. The favorable legislative/administrative treatment given to cable companies in this regard is indefensible in a just compensation case.

B. The Court of Appeals Erroneously Re-Wrote the "Market Value" Standard.

Most troubling for all private property owners, the court of appeals abandoned the *hypothetical* willing buyer/willing seller standard, instead requiring that APCo prove the existence of an *actual* buyer "waiting in the wings" before it can claim that its property has any value. Pet. App. 21a, 24a. In so doing, the court of appeals has fundamentally re-written the market value standard.

This Court consistently has defined "market value" as "the price at which the asset would change hands between a hypothetical willing buyer and willing seller, neither being under any compulsion to buy or sell." *Newark Morning Ledger Co. v. United States*, 507 U.S. 546, 570 (1993) (defining "market value" in a tax case); *see also Toronto*, 338 U.S. at 402 (discussing . . . market price in relation to the "hypothetical buyer"). Following this Court's precedent, a condemnee has not been required to show the existence of an actual seller and buyer or the existence of an actual market. *See, e.g., Kimball Laundry Co. v. United* States, 338 U.S. 1, 6 (1949) ("But since a transfer brought about by eminent domain is not a voluntary exchange, this amount can be determined only by a guess, as well informed as possible, as to what the equivalent would probably have been had a voluntary exchange taken place."). Instead, "a showing of potential sellers and buyers in a potential market will suffice." *See, e.g., South Bay Irrigation Dist. v. California—Am. Water Co.*, 133 Cal. Rptr. 166, 184 (Cal. App. 1976); *see also Palazzolo*, 533 U.S. at 625 (discussing zoning restrictions that have to be considered when valuing "hypothetical uses").

The court of appeals' ruling has changed this long-standing *hypothetical* paradigm. Now, any private property owner whose land is condemned by the government must scramble immediately to market its property. The property owner must

also successfully locate an actual buyer in order to have the benefit of the traditional standard.

C. By Denying APCo Judicial Review Of Its Evidence Supporting Its Just Compensation Price, The Court Of Appeals Violated The Rule In *Monongahela*.

This Court held in *Monongahela* that the determination of just compensation is ultimately a judicial function.

> By this legislation congress seems to have assumed the right to determine what shall be the measure of compensation. But this is a judicial, and not a legislative, question. The legislature may determine what private property is needed for public purposes; that is a question of a political and legislative character. But when the taking has been ordered, then the question of compensation is judicial. It does not rest with the public, taking the property, through congress or the legislature, its representative, to say what compensation shall be paid, or *even what shall be the rule of compensation.* The constitution has declared that just compensation shall be paid, and the ascertainment of that is a judicial inquiry.

148 U.S. at 327 (emphasis added); *see also Baltimore & Ohio R.R. v. United States*, 298 U.S. 349, 368 (1936) ("The just compensation clause may not be evaded or impaired by any form of legislation.").

The court of appeals' holding in this case violates the separation of powers and due process concerns underlying *Monongahela* and its progeny in two separate respects.[4]

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[4] *Monongahela's* holding that the determination of just compensation is a judicial function remains the consistent and undiminished position of this Court. *Monongahela* was cited by Justice Scalia in a concurring opinion in *Suitum v. Tahoe Reg'l Planning Agency*, 520 U.S. 725, 748 (1997). The case was cited with approval in the Court's opinion in

First, the 1996 Amendments to the Act effected a taking of utility property. Yet, Congress left in place as the "rule of compensation" the old Cable Rate—an outdated policy-based rate designed to expand cable companies through subsidized rates. The FCC has imposed the Cable Rate as a binding rule of compensation. Pet. App. 90a-91a (¶ 3) ("In order to calculate a reasonable pole attachment rate . . . we apply our Cable Formula."). Thus, in this instance, Congress not only determined both "what private property is needed for public purposes . . . a question of a political and legislature character," but also impermissibly set "the [binding] rule of compensation." *Monongahela*, 148 U.S. at 327.

Second, in the context of the Act, the Eleventh Circuit previously ruled that *Monongahela* is satisfied where the FCC sets the amount of compensation due, subject to "judicial review." *Gulf Power*, 187 F.3d at 1333 (citing *Wisconsin Cent. Ltd. v. Pub. Serv. Comm'n*, 95 F.3d 1359, 1369 (7th Cir. 1996)). Here, even as interpreted by *Gulf Power* and *Wisconsin Central*, the holding in this case violates the *Monongahela* mandate. APCo's just compensation evidence did not receive "judicial review." Instead, the court of appeals sanctioned a process whereby APCo's evidence concerning just compensation was cast aside and labeled "irrelevant." The court of appeals went so far as to erroneously characterize APCo's evidence concerning just compensation as "a legal issue that *hardly warrants an evidentiary hearing*." Pet. App. 24a (internal citations omitted) (emphasis added). That is not the "judicial inquiry" contemplated by this Court in *Monongahela* or the "judicial

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PruneYard Shopping Ctr. v. Robbins, 447 U.S. 74, 83 n.7 (1980). In *United States v. Sioux Nation of Indians*, 448 U.S. 371, 417 n.30 (1980), the Court stated that *Monongahela* stands for "the ancient principle that the determination of the measure of just compensation for a taking of private property is a judicial and not a legislative question." (quotations omitted).

review" envisioned by its progeny. *See Baltimore & Ohio R.R.*, 298 U.S. at 368-69 ("When [a condemnee] appropriately invokes the just compensation clause, he is entitled to a judicial determination of the amount. The due process clause assures a full hearing before the court or other tribunal empowered to perform the judicial function involved. *That includes the right to introduce evidence and have judicial findings based upon it.*") (emphasis added).

Due process demands that APCo receive a judicial hearing in which its evidence is considered. *Walker v. Hutchison*, 352 U.S. 112, 115 (1956) ("It cannot be disputed that due process requires that an owner whose property is taken for public use must be given a hearing in determining just compensation."). Moreover, the hearing must be before an independent forum. *See, e.g., Bailey v. Anderson*, 326 U.S. 203, 205 (1945); *Bragg v. Weaver*, 251 U.S. 57, 59 (1919). APCo's unfulfilled quest for just compensation, through the FCC (where Congress' binding rule was enforced) and the court of appeals (where the court turned a blind eye toward APCo's evidence), does not comport with due process as defined by this Court.

II. THE COURT OF APPEALS' RULING CONFLICTS WITH THE FEDERAL GOVERNMENT'S PRACTICE OF CHARGING "MARKET VALUE" FOR FIBER OPTIC ATTACHMENTS IN PUBLIC RIGHTS-OF-WAY.

The court of appeals' ruling, supporting the FCC's position, that APCo's utility pole space has no value conflicts with the government's practice in leasing its own rights-of-way. Fiber optic companies of all types (*i.e.*, cable, telecommunications and internet service providers) have sought access not only to utility poles, but also to private land and

public rights-of-way (such as highways, bridges, ocean floors, and mass transit easements). As a result,

> [f]ederal agencies such as the United States Department of Transportation, the United States Department of Interior . . . , the United States Department of Agriculture . . . and the National Oceanographic and Atmospheric Administration ("NOAA") have all been actively engaged in assessing value for rights-of-way for years.

TeleCommunity Alliance, *Valuation of the Public Rights-of-Way Asset,* p. 1, n.1, *available at* http://www.telecommunityalliance.org/images/valuation2002.pdf (last visited April 1, 2003).

Not surprisingly, when leasing its own rights-of-way, the federal government imposes a "fair market value" standard. *See* 43 C.F.R. subt. 2803 (2003) (addressing valuation of rights-of-way and requiring that the government receive fair market value for their use). Indeed, "a whole industry has developed to provide federal, state, and local governments, as well as individual land-owners, with valuation of their rights-of-way." *TeleCommunity*, p. 1 n.1.

As just one example, in valuing the price to be charged fiber optic companies to bury cable in underwater rights-of-way, NOAA discussed various valuation methodologies (none of which being even remotely akin to "zero value/ marginal costs") and concluded that "fair market value" should be charged. *See Fair Market Value Analysis for a Fiber Optic Cable Permit in National Marine Sanctuaries*, NOAA (Aug. 2001) ("NOAA Report"). The NOAA Report explained that rights-of-way values "have been rapidly growing over the last fifteen years" as telecommunications and cable companies competed for space to string their cables. *Id.* at 18. The report identified several relevant market transactions supporting its "fair market value" standard:

> 1. A 1988 United States Department of Transportation market price of $31,250.00 per mile for non-exclusive

rights-of-way (citing *Shared Resources: Sharing Right-of-Way for Telecommunications*, U.S. Dept. of Transp. (April 1996));[5]

2. A 1994 Bureau of Reclamation market price of $50,000 per mile for non-exclusive interstate rights-of-way;

3. A San Francisco, California, annual rent of $350,000 per mile for a seven mile right-of-way that crossed the grounds of the Presidio and the Golden Gate Bridge;

4. An Austin, Texas, price of $126,316 per mile for an easement of thirty-one miles of transit authority right-of-way; and

5. The Massachusetts Turnpike Authority's price of $112,477 per mile per year (plus a fee for each fiber deployed) for a fifty mile right-of-way. The parties agreed that the additional fiber fees had the potential to raise the level of compensation to $1 million per year.

Id. at 18-20.

The court of appeals' characterization of APCo's pole space as "nonrivalrous" and as having *zero value* conflicts directly with the current market realities and the established practice of the federal government in valuing its own property for the exact same purpose—running cables. If federal and state owned rights-of-way are "rivalrous" and valuable, so too are those owned and controlled by electric utilities.[6] APCo's

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[5]Such market value transactions are possible because the statutory Cable and Telecom Rates are not imposed on railroads, electrical cooperatives and federal/state owned utilities. Pet. App. 100a (§224(a)(1)).

[6] The active market for communications corridors is not limited to governmental rights-of-way. Several railroad companies charge linear foot attachment rates that equate to pole attachment rates of $23 in rural areas and $1,257 in urban areas. APCo's Response to Complaint, Ex. B, pp. 8-17, 29-30. Even the complaining cable companies use the active market rates when it benefits them. For example, Comcast owns cellular towers and typically charges market rates for attachments ranging from

property has a fair market value, such value is determinative under the Just Compensation Clause, and Congress cannot statutorily ignore it under *Monongahela*. *See* pp. 18-20, *supra*.

III. THE COURT OF APPEALS' RULING IS FUNDAMENTALLY ERRONEOUS.

The court of appeals recognized the novelty of its ruling by describing APCo's argument as one to which it "might ordinarily be sympathetic," but for "one known fact, one unknown fact, and one legal principle." Pet. App. 17a and n.20. As it turns out, the court of appeals applied a wholly irrelevant fact and created an erroneous fact in imposing upon APCo its newly created "legal principle." The record below, cast aside by the court of appeals as "irrelevant," simply does not square with the court of appeals' analysis.

A. The "Known Fact" That Cable Companies Pay "Make-Ready" Costs Is Irrelevant To A Takings Analysis.

The so-called "known fact" that served as the springboard for the court of appeals' novel analysis is that cable companies pay make-ready costs before actually physically occupying APCo's property. The FCC defines make-ready as "the modification of poles or lines or the installation of guys and anchors to accommodate additional facilities." Pet. App. 93a (n.28). That is, make-ready costs are nothing more than reimbursement for the actual expenditures incurred by APCo

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$18,000-$21,600 annually. *Id.*, p. 11. Yet, recently, the FCC ruled that electric utilities were limited to the statutory cost based recovery for attachments on certain transmission structures. *Omnipoint v. PECO Energy Co.*, PA-97-002, 2003 FCC LEXIS 1529, at *7 (Mar. 25, 2003). The *Omnipoint* ruling further demonstrates that unless this Court intervenes, the FCC will continue to take private property for the "larcenous benefi[t]" of cable and telecommunications companies. *Brown*, 2003 WL 1523550, *19 (Scalia, J., dissenting).

to alter its facilities to safely allow the attachment. The fact that APCo "received more than a million dollars" as reimbursement for expenses that would never have arisen but for its duty to accommodate the additional facilities has *nothing* to do with the value of the space permanently occupied by the attachment. *See Olson*, 292 U.S. at 255 ("It is the property and not the cost of it that is safeguarded by [the] Constitutio[n].") (quoted in *Brown*, 2003 WL 1523550, at *17 (Scalia, J., dissenting) (alterations in original)).

B. APCo's Pole Space Is Not "Nonrivalrous."

The court of appeals described "nonrivalrous" property as property that may be used by one entity without "necessarily diminish[ing] the use and enjoyment of others." Pet. App. 18a. According to the court, the "common example" of a "nonrivalrous good" is the "national defense." Pet. App. 18a. APCo's poles are in no way like the amorphous and intangible national defense. APCo's pole space is physical, tangible property that, once taken, is lost to APCo.

The court of appeals' designation of APCo's property as "nonrivalrous" is premised on its erroneous assumption that APCo's poles make up a hypothetical "network of poles that reaches one million feet into the sky." Pet. App. 18a-19a. To the extreme contrary, the record is clear that APCo's "network" is a finite and limited resource. The average pole in APCo's network is only 40 feet tall, with only 10.5 feet of space that is "usable" for non-core purposes. APCo's Response, Ex. A, ¶ 8. With an average of 7 feet required for electric supply facilities, and 2.5 feet for the ILEC (*e.g.*, BellSouth), there is only one foot available for cable and non-ILEC telecommunications attachments (those covered by the Act). The FCC presumes that each cable/telecom attachment occupies 1 foot of space. Thus, on the average pole, the limited communications space accommodates only one cable or non-ILEC telecommunications attachment.

In the court of appeals' own words, "if crowded, [APCo's] pole space becomes rivalrous." Pet. App. 20a. The record facts establish that APCo's pole space is finite and indeed crowded. Once a cable company attaches (which obviously has happened in this case), APCo's limited communications space is lost (on average). The record facts (ignored by the court of appeals as "irrelevant") squarely refute the court of appeals' conclusion that APCo's poles are "nonrivalrous." APCo's pole space is no more "nonrivalrous" than the hypothetical private field (*see* pp. 10-11, *supra*) and is clearly different than the intangible "national defense."

The court of appeals' "nonrivalrous" analysis was borne out of abstract economic theory and in theory it should remain.[7]

C. APCo Has Identifiable And Valuable Lost Opportunities.

The court of appeals concluded that APCo could not seek any compensation for the actual pole space taken unless it can prove "with regard to *each* pole that (1) the pole is at full capacity [elsewhere characterized by the court of appeals as "crowded"]; and (2) either (a) another buyer of the space is waiting in the wings or (b) [it] is able to put the space to a

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[7]Although it cannot be found in any published opinion (and certainly not in any physical takings case), the concept of "nonrivalrous" property has been the subject of scattered economic and intellectual property writings. Indeed, the very language used by the court of appeals seems to have its genesis in a comment entitled *Taking the Oakland Raiders: A Theoretical Reconsideration of the Concepts of Public Use and Just Compensation*. *See* Crafton, 32 Emory L.J. 857, 865 (1983) ("Public goods also are characterized by nonriavlry in consumption. Nonrivalry means that consumption by one individual does not reduce the benefits enjoyed by, or increase the cost to, another user or consumer . . . . The paradigm (or central) example of a pure public good is national defense.").

higher valued use with its own operations." Pet. App. 21a (emphasis added). According to the court of appeals, unless APCo could meet those requirements there is no "lost opportunity." *Id.* Putting aside the foundational errors facially apparent from this new heightened standard that was imposed retroactively upon APCo[8] and the reality that APCo's pole space is "crowded," the court of appeals is simply wrong in finding no lost opportunities.

As explained by APCo's expert appraiser (which, as noted above, was ignored by the court as being "irrelevant"), APCo has lost the following identifiable and valuable opportunities: (1) to sell, at a market rate, the pole space occupied by the cable company;[9] (2) to instead sell that limited pole space at an unregulated rate to a non-cable or non-telecom business that needs to run fiber optic cable; (3) to deny all third party attachers access to its poles in favor of a cable/telecom affiliate that could use the space to compete with the cable

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[8] First, as discussed *supra* at pp. 17-18, takings law has never required proof of an actual buyer—only a hypothetical buyer. Second, it is fundamentally unfair to uphold the FCC's rate (which is based upon numerous *presumptions* about the average pole), yet require APCo to make *factual* showings "with regard to *each* pole." Pet. App. 20a-21a. There are approximately 380,000 APCo poles at issue in this case. APCo's Response, Ex. A, Tab 1, ¶ 6.

[9] The court of appeals hypothesizes about a government run cable company and says "it would not make sense for [a utility] to say, '[e]ven though we are not out any more money than we were before the taking, we are missing out on the opportunity to sell to the government at what we deem the 'full market price' of this pole space.'" Pet. App. 19a. Though the point of this hypothetical is unclear, it is undisputable that the government cannot "depress property values, directly or indirectly, by interfering with the property owners' rights to use their land, and then take advantage of such depression to reduce the price which it must pay for the property." *Assateague Island Condemnation Cases v. 222.0 Acres of Land*, 324 F. Supp. 1170, 1180 (D. Md. 1971) (citing *United States v. Virginia Electric & Power Co.*, 365 U.S. 624 (1961)). If allowed to stand, the court of appeals' opinion will have effected just that result.

companies;[10] and (4) *at a bare minimum,* the opportunity to deny cable companies access to its poles and instead only sell its limited pole space to telecommunications entities (at the statutory Telecom Rate which is significantly higher than the Cable Rate) (*see* pp. 15-16 *supra*). APCo's Notice of Supplemental Authority (Sept. 9, 2000), Second Affidavit of Henry J. Wise, MAI, p. 5. Thus, unlike the cash deposit that could not legally earn interest in *Brown*, APCo's pole space can and does earn rentals at rates substantial higher than the Cable Rate (imposed by Congress through the FCC).

CONCLUSION

The court of appeals' holding, that reimbursement of marginal cost with no compensation for the actual property taken provides APCo just compensation, is not only unprecedented, but also conflicts with well-established precedent of this Court. The only authority cited by the court of appeals in support of its holding is an inapposite rate-making case. With its nonrivalrous/marginal cost analysis, the court of appeals essentially ruled that the finite and limited space on APCo's network of poles has no value. The court of appeals' nonrivalrous label is flawed (even under its own analysis) and entirely inapplicable to APCo's tangible, private property. "Nonrivalry" and the physical occupation of tangible, private property are mutually exclusive concepts.

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[10] This is another critical analytical inconsistency in the court of appeals' opinion. The court of appeals seemed to recognize the value and the "incentive [utilities may have] to deny potential rivals the pole attachments they need," yet concluded there is no value in doing so. Pet. App. 8a. If APCo could, hypothetically, gain market advantage by excluding telecommunication attachers that compete with its subsidiaries, its incentive is monetary and, therefore, a lost opportunity. While APCo certainly is not seeking to engage in anticompetitive behavior or to seek what cable companies routinely label "monopoly rents," the market incentive it may have to do so must be a "rivalrous" use under the court of appeals' analysis.

The court of appeals' ruling impacts all public utility pole owners, thereby raising questions of exceptional national importance. Moreover, the court of appeals' departure from the time honored fair market value standard creates dangerous precedent for all property owners and should be resolved by this Court after a full briefing on the merits.

This Court was divided in *Brown*. The court of appeals' decision presents an opportunity for this Court again to address the synonymity of "just compensation" and "fair market value" to prevent misuse of the *Brown* ruling and avoid the "potentially far-reaching consequences" feared by Justice Scalia—*i.e.*, "disastrous" cases like this one. *Brown*, 2003 WL 1523550, at *16, *19 (Scalia, J., dissenting).

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